SUPREME COURT, U. S.

SEP 23 1961

JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1961

No. 440

ROBERT BORUM,

Petitioner,

vs.

INDUSTRIAL COMMISSION OF WISCONSIN AND AMERICAN MOTORS CORPORATION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner Robert Borum prays that a Writ of Certiorari issue to review the Order of the Supreme Court of Wisconsin of June 27, 1961, denying Petitioner a rehearing.

OPINIONS BELOW

The opinion of the Circuit Court for Dane County, Wisconsin, is attached hereto as Appendix, page 8. The opinion of the Supreme Court of Wisconsin is reported in 13 Wis. (2nd) 570 and also in the Appendix

hereto attached as page 13. The order of the Supreme Court of the State of Wisconsin denying rehearing is set forth in Appendix attached hereto as Appendix, page 17.

JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S. Code, Section 1257(3). The Courts of Wisconsin, contrary to the provisions of Article I, Section 9 of the Wisconsin Constitution refuse to grant petitioner a full rehearing and remedy for injuries sustained to his person in an industrial accident. The failure to grant petitioner a full hearing also violates Article XIV, Section I, United States Constitution in that petitioner is being deprived of rights without due process of law.

QUESTION PRESENTED

The sole question is whether the Courts of the State of Wisconsin by denying petitioner a hearing as to all injuries allegedly incurred in an industrial accident of March 31, 1955 has been granted that remedy at law or due process of law as guaranteed by Article I, Section 9, Wisconsin Constitution and Article XIV, Section I, United States Constitution.

The Courts of the State of Wisconsin hold that a person injured in an industrial accident has a right to only one hearing and that the Industrial Commission of the State of Wisconsin is without jurisdiction to entertain a request for an additional hearing for injuries arising out of the original accident but medically unascertainable at the time of its original hearing.

STATUTES INVOLVED

United States:

The Fourteenth Article of the United States Constitution is primarily involved.

> "No state shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; . . ."

Wisconsin:

The first Article, Section 9 of the Wisconsin Constitution states:

> "Every person is entitled to a certain remedy in the law for all injuries, or wrongs, which he may receive in his person, property or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws."

STATEMENT OF CASE

The Petitioner was injured during the course of his employment on March 31, 1955. The hearing petitioner had before the examiner of the Wisconsin Industrial Commission in 1955 concerned itself primarily with petitioner's claim for permanent disability to his stomach, back and legs. There was some very limited and inconsequential testimony as to psychoneurotic condition of petitioner and as to whether or not petitioner's symptoms were on a psychoneurotic basis. However, the Industrial Commission of the State of Wisconsin, on review dated November 30, 1955, affirmed the examiner's findings and award which found no permanent disability. The matter

was then appealed to Circuit Court, Dane County, Wisconsin, and the Industrial Commission was affirmed by judgment dated May 19, 1958. Subsequently this judgment was affirmed by the Supreme Court of the State of Wisconsin on January 2, 1959. (*Borum vs. Industrial Commission,* 6 Wis. (2nd) 168). There was no formal finding of fact or written determination in this case at that time on petitioner's claim for "traumatic neurosis." This condition was not fully ascertainable from a medical standpoint until after the initial hearing. The petitioner has undergone constant medical treatment since June 23, 1956 for "traumatic neurosis" and has competent and expert medical testimony to offer as to the existence of the same which definitely relates it back to the injury of March 31, 1955. Therefore, petitioner by application dated March 9, 1959 claimed disability for "traumatic neurosis" caused by the accident hereinbefore referred to. The Industrial Commission examiner by order dated September 4, 1959, ruled that the rights and liabilities of the parties were finally adjudicated by the Supreme Court and the Industrial Commission does not have jurisdiction with regard to any issue or claim related to the injury of March 31, 1955. Upon petition for review, the Industrial Commission of Wisconsin on October 7, 1959, affirmed the findings and order of its examiner made on September 4, 1959. This has subsequently been affirmed by Circuit Court of Dane County, Wisconsin, by decision dated October 13, 1960 (App. page 8 and by decision of the Supreme Court of the State of Wisconsin in 13 Wis. (2nd) 570 (Appendix page 13) and by the Supreme Court of the State of Wisconsin denying rehearing to petitioner, (Appendix page 17).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits that the Supreme Court of Wisconsin erred is not granting to him a new hearing for injuries arising out of a compensable accident but injuries which were not medically ascertainable at the original hearing in 1955. Petitioner has incurred a traumatic neurosis which incapacitates him for life from any gainful employment. It is the intention of all Workman's Compensation Laws to protect the rights of injured workmen. As a matter of fact, Article I, Section 9, Wisconsin Constitution guarantees a remedy in law to all persons for injuries to his person. To allow the petitioner to be deprived of an opportunity to seek redress to the Industrial Commission and the Courts because he has had a hearing, even though no evidence of his condition was available to him, would seem to limit the petitioner's "certain remedy" so as to make it a "one chance, petitioner beware" exercise. This clearly defeats the intent of the Constitutional provision. It was through no fault of petitioner that the original hearing was incomplete. It is fully conceded by all parties that petitioner had a right to proceed against the employer. He had this right under the old common law doctrine of Master and Servant. He certainly had the right under the Wisconsin Workmen's Compensation Act. *Scholberg v. Itnyre*, 264 Wis. 211, reiterates this by stating that the provision of Article I, Section 9 of the Wisconsin Constitution is applicable but only where there is an infringement of a legal right or failure to discharge a legal duty. Certainly a legal right has been infringed or not fully discharged by Respondents failure to review the full sequalae of petitioner's injuries. He has not been granted a certain remedy for all his injuries. The Respondent, Industrial Commission of the State of Wis-

consin, complains that they lack jurisdiction to hear the case again as to the "traumatic neurosis" claimed by petitioner. Our act, they say, does not grant the Industrial Commission continuing jurisdiction once a final award has been made. It is in this respect that petitioner's rights are infringed and Article XIV, Section I, of the United States Constitution is also violated. This is not due process as envisioned by the makers of the Federal Constitution. Petitioner has been deprived of his rights by an incomplete procedure which abridges that full determination guaranteed by both the Wisconsin Constitution and the United States Constitution. This is not "due process" but rather a stilted, technical watering down of fundamental rights. The phrase "cause of action" is used and confined to one hearing. Possibly this may be expedient and efficient but is not due process. The New York Compensation Act has recognized the problem inherent in the instant case and has given their Compensation Board continuing jurisdiction. The case of *Stimburis v. Leviton Mfg. Co.* (1959), 5 N.Y. (2d) 360, 157 N.E. (2d) 621, and *Roder v. Northern Maytag Co.* (1948), 297 N.Y. 196, 78 N.E. (2d) 470 permit belated reconsideration of disability notwithstanding prior final orders dismissing applications for compensation. This petitioner stresses that this would seem to be a full guarantee of "due process". Obviously the Wisconsin procedure does not give this same guarantee.

CONCLUSION

Petitioner submits that the procedure as used in the instant case did not adequately support his rights to a "certain remedy" under the Constitution of the State of Wisconsin and "due process" under the United States Constitution. Wherefore, your petitioner prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court and the ruling of the Supreme Court of Wisconsin reversed.

Respectfully submitted,

ROBERT BORUM, Petitioner

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APPENDIX A

MEMORANDUM OPINION

(Omitting Formal Parts)

This is an action to review an Order of the Industrial Commission, dated October 7, 1959, dismissing plaintiff's application for compensation on the grounds of lack of jurisdiction in view of the Supreme Court decision in *Borum v. Ind. Comm.* (1959) 6 Wis. 2d, 168, 93 N.W. 2d, 860, involving the same accident.

On March 31, 1955, while he was working on a box of material, plaintiff was squeezed between the box and a lift truck. Thereafter plaintiff made an application to the Industrial Commission to determine the disability resulting from his injuries. The Commission determined the extent and duration of temporary total and temporary partial disability, with which such determination plaintiff disagreed and appealed to the Circuit Court, and from there to the Supreme Court. The Supreme Court affirmed the determination on the ground that when there is conflicting medical testimony, the determination of the extent or duration of disability, presents a question of fact, and not of law, and the findings of the Commission are conclusive if supported by credible evidence. *Sheehan v. Ind. Comm.* (1956) 272 Wis. 595, 600, 601, 76 N.W. 2d 343. The Court held simply that the wealth of medical testimony "amply supports the award and the Commission's order and is conclusive upon us." *Borum v. Ind. Comm.*, supra, at Page 170.

Plaintiff's present theory is a request for a determination of the extent of disability due to traumatic neurosis resulting from the original physical injury. This theory is based upon a claim that the case of *Johnson v. Ind.*

Comm. (1958) 5 Wis. 2d, 584, 93 N.W. 2d 493, which was decided after the first hearing in the Borum case before the Industrial Commission, for the first time in the history of our state established traumatic neurosis as being compensable. Accordingly, plaintiff argues, that in addition to the original determination of the extent and duration of disability from physical injury, that the Commission should now determine what, if any, disability has resulted from the traumatic neurosis.

Plaintiff's theory is untenable for two reasons: ((1) The question of any disability resulting to plaintiff from traumatic neurosis was thoroughly briefed in the Supreme Court, although the Court did not see fit to expand its opinion to comment thereon, and (2) the Johnson case did not establish any new law or any new basis for claims for workmen's compensation, but merely was a clear exposition of the existing law, particularly as it related to a proper "healing period" when traumatic neurosis has been established by a proper quantum of evidence.

In his Supreme Court brief, the plaintiff contended that the Commission erred in "omitting from its findings of fact a reference to psychoneurosis condition which physicians for the plaintiff and defendants testified existed."

The briefs of both respondents argued this question, the Attorney General pointing out that the only testimony about psychoneurosis had been produced from two orthopedic specialists. One of the specialists felt that plaintiff's symptoms were partly on a psychosomatic basis, but he had no opinion as to when "it might be possible to determine permanent partial disability, if any." The other orthopedic specialist testified that plaintiff's psychosomatic symptoms would come to an end when the litigation was closed.

In view of the fact that the Supreme Court did not comment specifically upon the psychoneurosis aspect of the case, plaintiff's counsel now asks this Court in frank bold language to indulge in the assumption that the Supreme Court did not know what was contained in the briefs, and were unaware of the decision in the Johnson case which was rendered one month previously. Even if sparked by a spirit of adventure, this Court would never indulge in such an outrageously insulting assumption, because it would be contrary to all the basic principles of law known to this Court. Findings of fact need be made only with respect to such ultimate facts as are inherent in and necessary to the determination of the questions involved in arriving at the decision. *Van Pool v. Ind. Comm.* (1954) 267 Wis. 292, 64 N.W. 2d 813. The ultimate question of fact which was reviewed by the Supreme Court was the finding of the Commission: "That the applicant suffered no permanent disability because of the injury in question." The Supreme Court merely concluded that this ultimate finding was sufficient without refinement and specification as to psychoneurosis.

A claimant for accident compensation has but one claim for benefits, one which is not severable, but includes all that might be awarded to him under the provisions of the workmen's compensation act, which specifically defines as compensable a mental injury as well as a physical injury. *State ex rel Watter v. Ind. Comm.* (1939) 233 Wis. 48, 287 N.W. 692; *Gergen v. Ind. Comm.* (1946) 249 Wis. 140, 142, 23 N.W. 2d 473; *Delta Oil Co. v. Ind. Comm.* (1956) 273 Wis. 285, 289, 77 N.W. 2d 749.

Plaintiff's right to benefits was completely determined by the decision in *Borum v. Ind. Comm.*, supra, and the Commission thereafter had no jurisdiction whatsoever to further entertain any claims by plaintiff arising out of the accident which occurred on March 31, 1955.

The Commission's Order is confirmed, and counsel for the Commission may draft the appropriate judgment, submitting it to opposing counsel ten days before presenting it to the Court for signature.

Dated this 13th day of October, 1960.

By the Court:

/s/ Norris Maloney.
Norris Maloney,
Judge

APPENDIX B

And afterwards to-wit on the 7th day of April, A.D. 1961, the same being the 61st day of said term, the following proceedings were had in said cause in this Court:

Robert Borum,

Appellant,

v.

Industrial Commission of the State of Wisconsin and American Motors Corporation,

Respondents.

And now at this day came the parties herein, by their attorneys, and this cause having been argued by A. L. Tilton, Esq., for the said appellant, and by Alfred E. La France, Esq., Harlow P. Bielefeldt, Jr., Esq., and Mortimer Levitan, Esq., Assistant Attorney General, for the said respondents, and submitted, and the Court not being now sufficiently advised of and concerning its decision herein, took time to consider of its opinion.

APPENDIX C

And afterwards to-wit on the 2nd day of May, A.D. 1961, the same being the 67th day of said term, the following proceedings were had in said cause in this Court:

Robert Borum,

Appellant,

v.

Industrial Commission of the State of Wisconsin and American Motors Corporation,

Respondents.

This cause came on to be heard on appeal from the judgment of the Circuit Court of Dane County and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the Circuit Court of Dane County, in this cause, be, and the same is hereby, affirmed.

APPENDIX D

No. 275

August Term, 1960

STATE OF WISCONSIN
IN SUPREME COURT

Robert Borum,

Appellant,

v.

Industrial Comm. and American Motors Corp.,

Respondents.

APPEAL from a judgment of the circuit court for Dane county: NORRIS MALONEY, Circuit Judge. *Affirmed.*

Appellant Borum applied to the Industrial Commission for an award of compensation alleged to be due him for a personal injury received in an industrial accident. The commission found that it had no jurisdiction to entertain the application and therefore dismissed it. Upon review by the circuit court the court affirmed the commission's order of dismissal and Borum has appealed.

The accident causing the injury occurred on March 31, 1955, while Borum was at work for American Motors Corporation, a respondent here. He applied promptly for workmen's compensation. The Industrial Commission heard his claim and on November 30, 1955, determined that he had suffered a temporary disability caused by the accident and "the applicant suffered no permanent disability because of the injury in question." The com-

mission awarded Borum compensation for the temporary disability so found and concluded its order: "Upon compliance with this order, the respondent [the employer] is discharged of further liability." The employer complied.

Borum was dissatisfied with the award, contending that on the evidence the commission should have found a permanent disability. He had a review by the circuit court for Dane county and the court sustained the order of the commission. Borum then appealed to the supreme court where the judgment of the circuit court was affirmed January 2, 1959, *Borum v. Industrial Comm.*, 6 Wis. (2d) 168, 93 N.W. (2d) 860. He did not move for rehearing but on March 10, 1959, he filed a new claim for injuries arising out of the accident and injury of March 31, 1955, alleging that the accident resulted in a traumatic neurosis which has permanently disabled him.

The commission and the employer oppose Borum's present application. They submit that the commission's order of November 30, 1955 was a final order and when it was sustained by the circuit court and affirmed by the supreme court the commission had no jurisdiction to entertain further proceedings respecting the results of the accident to Borum.

Additional facts will be given in the opinion.

BROWN, J. Appellant's 1955 application sought compensation for whatever injuries he received in the accident. The commission made an award for a temporary disability and specifically determined that the injury caused him no permanent disability. He challenged the latter finding and the order based upon it but upon review and appeal, as permitted him by statute, the commission's determination was upheld. The commission's order was unquestionably a final order; appellant does not contend

otherwise, but he submits that, although the order of November 30, 1955 is a final one, under the circumstances the final order does not exhaust the commission's jurisdiction. Borum argues that if he is permitted to present his case again to the commission he would offer medical evidence concerning traumatic neurosis which was formerly unavailable to him and unknown to science when his application was heard in November of 1955, and such new evidence could produce a different conclusion respecting the permanence of Borum's disability. He concedes that heretofore Wisconsin gives the injured employee a single cause of action for compensation for all injuries and disabilities arising out of and as a result of an industrial accident. Appellant's concession correctly states the law. We have held that an injured employee's right to recover workmen's compensation is based on ch. 102, Stats.; he has but one cause of action for compensation for all injury and disability sustained as a result thereof, and his claim therefor is not severable. When the commission makes findings and a final award it is not passing upon merely the employee's right to compensation for certain claimed or then known injuries. It is passing upon all compensation payable for all injuries caused by that accident. *State ex rel. Watter v. Industrial Comm.* (1939), 233 Wis. 48, 52, 53, 287 N.W. 692; *Delta Oil Co. v. Industrial Comm.* (1956), 273 Wis. 285, 289, 77 N.W. (2d) 749. Having entered a final order on the subject and the statutory time for review having expired, the commission lacks jurisdiction to proceed on a subsequent application for injuries allegedly sustained in the same accident. (Idem) We have applied this principle to deny relitigation of compensation claims after disposition of them has been made by the commission's final orders and the time for review has expired. For

example, see *Gergen v. Industrial Comm.* (1946), 249 Wis. 140, 142-143, 23 N.W. (2d) 473. The commission thereafter has no further jurisdiction to resume consideration of the consequences of the same accident. *Gergen Case, supra; Sheehan v. Industrial Comm.* (1956), 272 Wis. 595, 602, 76 N.W. (2d) 343.

Appellant commends the New York court for permitting belated reconsideration of disability notwithstanding prior final orders dismissing applications for compensation. *Stimburis v. Leviton Mfg. Co.* (1959), 5 N.Y. 2d 360, 157 N.E. 2d, 621, and *Roder v. Northern Maytag Co.* (1948), 297 N.Y. 196, 78 N.E. 2d 470. He urges us to emulate the example set by the courts of our sister state. The New York compensation act under which this relief was granted gave to the compensation board a continuing jurisdiction. With no similar provision in the Wisconsin compensation act, ch. 102, Stats., the jurisdiction of the Industrial Commission is exhausted by a final order for compensation when the statutory time for review has expired or the last review permitted by statute has confirmed that final order.

By the Court. — Judgment affirmed.

APPENDIX E

And afterwards to-wit on the 27th day of June, A.D. 1961, the same being the 81st day of said term, the following order was entered in this Court:

Robert Borum,

Appellant,

v.

Industrial Commission of the State of Wisconsin and American Motors Corporation,

Respondents.

The Court being now sufficiently advised of and concerning the motion of the said appellant for a rehearing in this cause, it is now here ordered and adjudged by this Court, that the said motion be, and the same is hereby, denied without costs.

FILED
OCT 20 19[illegible]
JAMES R BRO[illegible]NG C[illegible]

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

RESTATED QUESTIONS

Respondents believe that the following questions describe the issues to be decided by this Court more accurately than the question set forth in Appellant's Petition for a Writ of Certiorari (p. 2).

1. Whether the Appellant timely raised the issue of the repugnancy of the Wisconsin courts' construction of the Wisconsin Workmen's Compensation Act to Article XIV, Section 1 of the United States Constitution?

2. If the answer to question 1 is "yes" then did the Wisconsin Supreme Court determine whether or not the

Act was so repugnant in denying Appellant's motion for rehearing?

3. If the answer to question 2 is "yes" then did the Wisconsin Supreme Court deprive Appellant of life, liberty or property without due process of law by denying his motion for rehearing?

STATEMENT OF CASE

It is necessary to correct inaccuracy in the statement of Appellant pursuant to Rule 40(3) of the Revised Rules of this Court. The following sentences set forth in Appellant's Petition for Writ of Certiorari have no support in evidence:

> "* * * This condition was not fully ascertainable from a medical standpoint until after the initial hearing. The petitioner has undergone constant medical treatment since June 23, 1956 for 'traumatic neurosis' and has competent and expert medical testimony to offer as to the existence of the same which definitely relates it back to the injury of March 31, 1955. * * * "

Appellant's Petition states (p. 4) that when the first decision of the Wisconsin Supreme Court was rendered on January 2, 1959, "There was no formal finding of fact or written determination in this case at that time on petitioner's claim for 'traumatic neurosis'." It should be noted that the Wisconsin Supreme Court had been apprised of Appellant's claim based on a psychoneurotic factor prior to reaching that decision, since Appellant's brief filed with the Wisconsin Supreme Court, prior to the oral argument on that appeal, criticized the Industrial Commission of Wisconsin for failing to make a specific finding upon such factor. Reply briefs filed by

the Respondent, Industrial Commission of Wisconsin, and by the Respondent, American Motors Corporation, also discussed such issue. (Respondents recognize that the briefs filed by Appellant and Respondents with the Wisconsin Supreme Court have not been included in the record filed by the Appellant with this Court pursuant to Rule 21(1). But Respondents respectfully submit that if Appellant objects to Respondents' references to the briefs, Appellant is reminded that he could have cured any procedural difficulties in that regard by properly including such briefs in the record, along with the oral argument before the Wisconsin Supreme Court.) The failure of the Wisconsin Supreme Court to comment specifically upon that aspect of the claim for workmen's compensation in its written decision does not create the inference that the Court did not consider it.

ARGUMENT

I.

Appellant's Petition is Jurisdictionally Deficient because Federal Question was Untimely Raised.

A cursory reading of Appellant's Petition for a Writ of Certiorari to the Supreme Court of Wisconsin discloses that the Statement of Case fails to include any specifications of or reference to the stage in the proceedings before the Wisconsin Industrial Commission and the Wisconsin courts at which any federal question was timely and properly raised. The failure of the Petition to include such a showing makes it patently deficient under Rule 23(1)(f) of the Revised Rules of this Court, and should impel this Court to decline jurisdiction to review the judgment on Writ of Certiorari.

The omission from the Petition of any reference to the phase in the proceedings at which a federal question sought to be here reviewed was raised is undoubtedly not inadvertent. The first instance at which Appellant contended the long-standing interpretation of the Wisconsin Workmen's Compensation Act by the Wisconsin Supreme Court was violative of Article XIV, Section 1 of the United States Constitution, was in his Brief on Motion for Rehearing of the opinion of the Wisconsin Supreme Court reported at 13 Wis. 2d 570. The decision on the first appeal of Borum to the Wisconsin Supreme Court is reported at 6 Wis. 2d 168, 93 N.W. 2d 860. The raising of such a constitutional issue on a motion for rehearing of the second opinion rendered by the highest Court of the State in a given case is plainly untimely, under both the law of the United States (*American Surety Co. v. Baldwin* (1932) 287 U. S. 156; *Live Oak Water Users' Asso. v. Railroad Commission* (1926) 269 U. S. 354; *McGarrity v. Delaware River Bridge Commission* (1934) 292 U. S. 19, rehearing denied (1934) 292 U. S. 607; Annotation—79 L. ed. 1539, 67 L. ed. 557, 49 L. ed. 414) and the law of Wisconsin (*Green Bay Drop Forge Co. v. Industrial Commission* (1953) 265 Wis. 38, 60 N.W. 2d 409; *C. F. Trantow Co. v. Industrial Commission* (1952) 262 Wis. 586, 55 N.W. 2d 884; *Baker v. Leenhouts* (1950) 257 Wis. 584, 44 N.W. 2d 544, certiorari denied (1951) 341 U. S. 945).

Appellant has never claimed, either in the proceedings before the Wisconsin courts or in his petition to this Court, that the interpretation of the Wisconsin Workmen's Compensation Act by the Wisconsin courts as applied to his second application for compensation based on "traumatic neurosis" was at variance with any earlier interpretations by such courts, so as to prevent Appel-

lant from anticipating the constitutional issue until the motion for rehearing, *Cf. Brinkerhoff-Farris Trust & Sav. Co. v. Hill* (1930) 281 U. S. 673; *Missouri ex rel. Missouri Ins. Co. v. Gehner* (1930) 281 U. S. 313; *Great Northern R. Co. v. Sunburst Oil & Ref. Co.* (1932) 287 U. S. 358; *Herndon v. Georgia* (1935) 295 U. S. 441. Since the Wisconsin Supreme Court declined to grant Appellant's motion for rehearing, the constitutional questions so belatedly raised in Appellant's Brief in support of such motion were never expressly considered and argued before the Wisconsin courts, see and compare *Cumberland Coal Co. v. Board of Revision* (1931) 284 U.S. 23, and, therefore, should not be considered by this Court by writ of certiorari.

II.

Appellant's Petition is Further Deficient because Decision of Wisconsin Supreme Court can be Predicated upon Adequate State Grounds.

As stated in Point I. of this Argument, Appellant has untimely raised an issue of constitutionality of the Wisconsin law that an injured employee has one cause of action for compensation for all injury and disability sustained as a result thereof. While this untimeliness is not reflected by the Petition, which failed to make any reference to the stage of the proceedings at which any federal question was first raised, a review of the entire record in the Wisconsin Supreme Court would readily demonstrate the intempestivity of the federal issue. Equally absent from the Petition is any notation showing that the Wisconsin Supreme Court passed upon the federal question first presented in Appellant's brief in support of his motion for rehearing, in determining that the motion should be denied. It is fundamental under Rule

23(1)(f) of the Revised Rules of this Court, 28 U. S. C. §1257(3) and the reported cases that before the Court can review a state court decision, the Appellant must show (1) that the state court actually decided a federal question, and (2) that decision of the federal question was necessary to the state court's determination of the cause. Because of the myriad of decisions supporting this proposition, Respondents merely refer to their citation in Annotation—100 L. ed. 1200, 84 L. ed. 925.

The record before this Court does not demonstrate whether the Wisconsin Supreme Court determined the federal issue raised by the brief of the Appellant in support of his motion for rehearing. In denying such motion, the Wisconsin Supreme Court tersely stated that they were "* * * sufficiently advised of and concerning the motion of the said appellant for a rehearing * * *." (Appellant's Appendix E, p. 17). Respondents contended in their brief in opposition to Appellant's motion for rehearing that under Wisconsin law the Appellant, having sought to recover benefits under the Workmen's Compensation Act, could not attack its procedural provisions. Respondent cited *Derong v. Industrial Commission* (1932) 209 Wis. 88, 244 N.W. 591; *Thomson v. Public Service Commission* (1940) 236 Wis. 157, 294 N.W. 517; *Meyer v. Industrial Commission* (1961) 13 Wis. 2d 377, 108 N.W. 2d 556; and *Booth Fisheries Co. v. Industrial Commission* (1924) 185 Wis. 127, 200 N.W. 775. In the last-cited case this Court, in affirming the decision of the Wisconsin Supreme Court, held that a litigant who elected to accept the benefits and immunities of the Wisconsin Workmen's Compensation Act could not escape its burdens by asserting that it was unconstitutional, *Booth Fisheries Co. v. Industrial Commission* (1926) 271 U.S. 208.

As a consequence of these decisions it is obvious that the decision of the Wisconisn Supreme Court in denying Appellant's motion for rehearing may in all probability have rested upon the adequate basis of the Wisconsin rule barring an employee receiving benefits under the Workmen's Compensation Act from questioning the validity of its provisions and administration. To assume that the decision was predicated on a determination involving the constitutional issue is to indulge in mere speculation. It follows therefrom that this Court is without jurisdiction to review the decision of the Wisconsin Supreme Court. *E.g., Flournoy v. Wiener* (1944) 321 U. S. 253; *Herb v. Pitcairn* (1945) 324 U. S. 117; *Stembridge v. Georgia* (1952) 343 U. S. 541; *Durley v. Mayo* (1956) 351 U. S. 277.

CONCLUSION

For the reasons stated, the United States Supreme Court does not have jurisdiction to grant a writ of certiorari upon the petition. It is respectfully submitted that Appellant's petition should be denied.

Respectfully submitted,

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